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IN THE

Supreme Court of the United States

October Term, 1955.

No. 403

PAUL FREEDMAN,

Petitioner,

vs.

DONOVAN & SCHUENKE, HORACE F. FRENCH, RALPH A. McCLURE and A. E. FRENCH,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY MEMORANDUM.

The Respondents' Brief addresses itself to peripheral matters only, and to improper arguments of evidence and fact foreclosed here, and avoids entirely the serious questions of policy and law affecting bankruptcy administration posed by the cause below and sought to be reviewed here on *certiorari*.

Untreated and unresponded to are the central and primary issues of the decision below, whether former officers of a corporate bankrupt are to be disqualified *in se* from bidding and purchasing at bankruptcy sales, the

companion question whether valuable and normal sources for bids and purchases are to be excluded in bankruptcy by extending mechanically the disability barring bids by Bankruptcy Court officers, and the Trustee, to ordinary and normal prospective purchasers interested in the estate who engage merely in *de minimus* acts of accommodation and service to the estate to save expenses, and, finally, whether in law and policy bankruptcy sales in any event can or should be upset upon such stated grounds years after their confirmation, in the face of the express bar of 11 U. S. C. 67(c), upon theory of being *void*, with consequent upsetting of the rights and interests even of BFP's.

Instead of responding to the above, respondents attempt to argue at length matters of evidence and to urge that the Referee should have found a disqualifying profit on the part of the purchaser-director below, D. J. Miller. This is urged in the teeth of the Referee's express conclusion on the facts that Miller suffered a *loss*, rather than making any gain [R. 13], and of the express acceptance of this conclusion of fact as binding and final by the Court of Appeals below (Slip Opinion, p. 5),* as well as by the District Court [R. 78]. *Certiorari* to this court is patently neither the time nor the place to reargue the facts.

The contention petitioner was lacking in standing to file the petition for rehearing below, or the petition for *certiorari* here, is without merit and overlooks the plain circumstance that petitioner was not a sole-party respon-

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*". . . the Referee has found that the price paid was adequate and that Miller, Seversen and Vreeland did not receive any profit on resale to Freedman. . . . these findings must be respected and the first ground of attack fails." (Slip Opinion, p. 5.)

dent below, guilty of failing to prosecute the true defense of an appeal, but rather was a secondary-party in interest below, for whom the briefs and defense of the Trustee in Bankruptcy sufficed fully in expression and coincided fully in interest at all stages prior to the adverse decision of the Court of Appeals below. At the point of that adverse decision the interests of petitioner and other second-party respondents below diverged from the Trustee in Bankruptcy, and petitioner and other parties like situated no longer were spoken for representatively by the Trustee. Thereupon petitioner took acts in his own behalf and directly, filing the petition for rehearing below, and the petition for *certiorari* here. This was but sensible and reasonable. Moreover, the Court of Appeals below passed upon the petition for rehearing upon its merits, denying the same on statement that petitioner was not situated as a BFP, thereby curing in any event any formal claims of defect in the petition. Even an untimely or otherwise formally defective petition, if within the jurisdiction of the court acting upon it, is cured of defects if passed upon on its merits and considered. (*Bowman v. Lopereno,* 311 U. S. 262, 266; *Wayne United Gas Co. v. Owens-Illinois Glass Co.,* 300 U. S. 131, 137-138.)

Wherefore, the petition for *certiorari* should issue.

Respectfully submitted,

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Of Counsel.